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Supreme Court of the United States

OCTOBER TERM, 1965

No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

H. BRICE GRAVES
RALPH H. FERRELL, JR.
JOHN W. RIELY
RICHARD G. JOYNT
1003 Electric Building
Richmond, Virginia 23212

JACK VICKREY
HOWARD D. McCLOUD
ROSS ARNOLD
3390 Peachtree Road, N.E.
Atlanta, Georgia 30326

Counsel for the Appellant

HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
Of Counsel

Dated February 3, 1966

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I.

OPINIONS BELOW

The opinion of the State Corporation Commission of Virginia (Appendix A, p. 1) is reported at 1964 S.C.C. Rep. 95. The opinion of the Supreme Court of Appeals of Virginia (Appendix A, p. 16) is reported at 206 Va. 517, 145 S.E. 2d 227.

II.

JURISDICTION

This is an application for refund of taxes levied on the money and intangible personal property of the Appellant. It was brought before the State Corporation Commission of Virginia pursuant to § 58-1122 of the Code of Virginia of 1950. The application was denied by the Commission on December 15, 1964. Upon appeal, the Supreme Court of Appeals of Virginia affirmed the order of the Commission on November 29, 1965.[1] Notice of Appeal was filed in that court on December 13, 1965.

The contention of the Appellant from the very initiation of this proceeding has been that § 58-588 of the Code of Virginia of 1950, as amended by Chapter 217 of the Acts of Assembly of Virginia of 1964, and the statutes related thereto, are, as applied to the Appellant, in violation of the Constitution of the United States as depriving the Appellant of its property without due process of law and as depriving it of the equal protection of the laws (R. 3).[2] These ques-

[1] A petition for rehearing filed by the Appellee (the successful party below) that related only to costs on appeal was denied on January 17, 1966, and is in no event relevant to this appeal.

[2] References to (R. .....) are to the record as printed for the court below, nine copies of which have been filed with the Clerk of this Court.

tions were considered and determined adversely to the Appellant by both tribunals below.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(2) and 2101(c) (1964 ed.). The former confers jurisdiction on this Court by way of appeal when the constitutionality of a State statute is brought into substantial question. This Court customarily receives cases from State courts relating to the constitutionality of State taxing statutes by the appellate route. *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959); *Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942); *N. & W. Ry.* v. *North Carolina,* 297 U.S. 682 (1936). A State decision enforcing a State statute in a particular transaction against a timely claim of a Federal right is subject to review on appeal. *Fiske* v. *Kansas,* 274 U.S. 380, 385 (1927). That situation obtains in this case.

III.

STATUTES INVOLVED

The statute chiefly involved is § 58-588 of the Virginia Code (1959 Repl. Vol. 8, p. 580). Before its amendment by Chapter 217 of the Acts of Assembly of 1964, this section provided:

> "§ 58-588. Report required.—Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas in the public service by means of a pipe line or pipe lines in this State, which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January pre-

ceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

"The report herein required shall be verified by the oath of the president or other proper officer or person making the same."

As amended on March 10, 1964 (Va. Code, 1964 Cum. Supp., p. 145), this section now provides, the amendments being shown by italics:

"§ 58-588. Report required.—Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit natural gas *or crude petroleum and the products or by-products thereof* in the public service by means of a pipe line or pipe lines in this State, which pays no State franchise tax on its gross receipts on account of the transmission of such natural gas *or crude petroleum and the products or by-products thereof* shall report annually on or before the fifteenth day of April to the State Corporation Commission all of its real and personal property of every description, tangible and intangible, as of the beginning of the first day of January preceding, showing particularly in what city, town or county and school district therein the property is located. This report shall be itemized as provided for herein. Each such corporation shall also report the total miles of mains located in this State.

"The report herein required shall be verified by the oath of the president or other proper officer or person making the same.

"This section as amended shall apply to the tax year beginning on January first, nineteen hundred sixty-four and to each tax year thereafter."

Also relevant are §§ 58-593 and 58-594 of the Virginia Code (1959 Repl. Vol. 8, p. 581) as follows:

> "§ 58-593. Rate of State tax on intangibles. —The State tax on the intangible personal property (other than shares of stock and bonds issued by counties, cities and towns or other political subdivisions of this State), owned by every corporation falling under the provisions of this article, shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof.
>
> "§ 58-594. Rate of State tax on money.—The State tax on the money of every corporation coming under the provisions of this article shall be twenty cents on every one hundred dollars of the assessed value thereof."

It is the retroactive application of the amendment of § 58-588 to levy a tax on all of its intangibles, including those having a commercial domicile outside Virginia, of which the Appellant complains in this case.

IV.

QUESTIONS PRESENTED

The questions presented are two:

1. May a State levy a tax retroactively when the taxpayer could not have anticipated and would have avoided the tax? That is what Virginia did in this case and its action is in violation of the due process and equal protection clauses of the Constitution.

2. May a State levy a tax on the money and intangible personal property of a corporation incorporated under its laws (and those of another State) when that money and intangible personal property have acquired a commercial domicile outside the taxing State? Again, Virginia answered in the affirmative and again its action is unconstitutional for the same reasons.

V.

STATEMENT OF THE CASE

The facts of the case were for the most part stipulated by counsel (R. 38-42). Some additional evidence was introduced at the hearing before the Commission (R. 5-22). The constitutional questions were raised in the initial pleading (R. 2-3) and determined adversly to the contentions of the Appellant both by the Commission (App. A, pp. 7, 14) and by the court below (App. A, pp. 22, 26).

The Appellant, originally a Delaware corporation, became a corporation also incorporated under Virginia law as the result of merger so that it might condemn property in Virginia. It transports petroleum products by pipeline as a common carrier from Texas to New York.

The Appellant maintains a statutory office in Delaware and a registered office in Virginia. But these are purely for the purpose of statutory compliance. Its offices are in Atlanta, Georgia. There, its general books and accounting records are kept, there its officers live, there its affairs are managed and directed, there it bills and collects for its services, there its Board of Directors normally meets.

Virginia assesses and taxes public service corporations differently from other corporations. A public service corporation, until recently, paid a substantial franchise tax but no income tax; other corporations paid an income tax but only an insubstantial franchise tax. The physical property of a public service corporation is separately assessed by the State Corporation Commission; the property of other corporations is assessed by local officials. Intangible property of other corporations is taxed, in the case of domestic corporations, only to the extent that it has not acquired a business situs outside Virginia.

But at January 1, 1964, the tax day involved here, Vir-

ginia had not provided for taxation of a petroleum products pipeline company as a public service corporation. So the Appellant, it was generally understood, was to be taxed in 1964 in the same way as corporations that were not public service corporations. This, in essence, had been the explicit determination of the State Corporation Commission in the fall of 1963.[3]

So the Appellant expected to be taxed as a non-public service corporation in 1964. This would mean that substantially all of its money and intangibles, having a commercial domicile in Georgia, would not be subjected to taxation by Virginia. The Appellant therefore took no steps to minimize its tax liability to Virginia. All other utilites operating in Virginia do so minimize their taxes by converting their money and other intangibles in temporary excess supply to Federal bonds, notes and bills that are not subject to the Virginia tax. Such conversion is customary practice for Virginia utilities (R. 19). But the Appellant, believing itself immune from this tax, did not follow the conversion practice.

Then came the bombshell. The Virginia General Assembly, meeting *after* the tax day of January 1, 1964, adopted an amendment to § 58-588 purporting to tax a petroleum products pipeline like a natural gas pipeline. And this amendment, which became effective on March 10, 1964, was specifically made retroactive to January 1, 1964. Pursuant to this statute, Virginia purports to tax all money and intangible personal property, wherever located. By the time of initial introduction of this measure, much less its adop-

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[3] *Commonwealth* v. *Colonial Pipeline Co.*, 1963 S.C.C. Rep. 83. The assertion by the court below that this decision should have alerted the Appellant to possible changes in tax legislation (App. A, p. 22) is not supported by record, fact or logic; in fact, the Appellant's expectations were to the contrary (R. 15-16).

tion and effective date, it was too late for the Appellant to take steps to minimize its tax burden.

The result is entirely unfair. The Appellant was required to pay a tax of $123,450 on its intangible personal property and a tax of $38,979 on its money. The other Virginia utilities, railroads being excluded, were forewarned and avoided the tax. Varying through the years from 184 to 207 in number, they paid total taxes as follows:

Taxes on	*1961*	*1962*	*1963*	*1964*[4]	*1965*[4]
Intangible Property	$ 4,257	$ 5,815	$ 5,821	$30,631	$ 8,461
Money	45,431	45,156	50,052	48,409	50,318

The Appellant was thus required to pay in 1964 a tax on intangibles four times as large as all other utilities, except railroads, lumped together and a tax on money that was more than 80% of the tax levied on all others. The Appellant learned its lesson: in 1964, it paid Virginia pursuant to these taxes a total of $162,429; in 1965 it paid $761. And this remarkable variance was possible only because Virginia accepts avoidance of the tax by investment in Federal securities. The Appellant had no chance to avoid the tax in this manner in 1964.

This utterly unfair result impelled the Appellant to seek relief from the Virginia courts. It began, as Virginia requires, before the State Corporation Commission. It raised there the applicable Federal questions. It raised them equally in the court below. Both tribunals denied relief.

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[4] Excludes taxes levied on the Appellant.

VI.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1.

An Unexpected Retroactive Tax That Would Have Been Avoided Is Unconstitutional

This Court has held that the retroactive application of a gift tax is unconstitutional. *Blodgett* v. *Holden,* 275 U. S. 142 (1927); *Untermyer* v. *Anderson,* 276 U. S. 440 (1928). In the former, this Court said:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." (p. 147)

In other words, the taxpayer did not expect the tax and could have avoided it by not making the gift.

Conversely, retroactive application of income and property taxes has been upheld by this Court. *Welch* v. *Henry,* 305 U. S. 134 (1938); *United States* v. *Hudson,* 299 U. S. 498 (1937); *Cooper* v. *United States,* 280 U. S. 408 (1930); *Philip Wagner, Incorporated* v. *Leser,* 239 U. S. 207 (1915). The reason for this is that no taxpayer would reasonably be expected to forego income or to dispose of property because of the subsequent imposition of a tax. In addition, especially in regard to the income tax, periodic retroactive revision—in fact, generally annual retroactive revision—is the rule rather than the exception and no taxpayer can reasonably contend that such a revision is unexpected. An income tax relates to a period of time, not a fixed tax day, as is the case of a property tax like that in question here.

The rule to be derived from these cases is this:

> "The primary consideration which appears from an analysis of the cases involving retroactive taxation is the ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the likelihood that having been able to foresee it, he could have altered his conduct to avoid the tax." Hochman *The Supreme Court and the Constitutionality of Retroactive Legislation* 73 Harv. L. Rev. 692, 706 (1960). *Cf. Cohan* v. *Commissioner,* 39 F. 2d 540 (2d Cir. 1930); *Wilgard Realty Co.* v. *Commissioner,* 127 F. 2d 514 (2d Cir. 1942); *United Business Corp. of America* v. *Commissioner,* 62 F. 2d 754 (2d Cir. 1933); *Prather* v. *Commissioner,* 322 F. 2d 931 (9th Cir. 1963).

The rule against retroactivity in taxation is thus two phased:

(a) The taxpayer on the tax day had no reasonable expectation that the tax would be imposed. The Appellant on the basis of the record here had no inkling that the tax would be imposed; it had every reason to believe that it would be taxed on an entirely different basis.

(b) The taxpayer, had it anticipated imposition of the tax, would and could have avoided the tax. The Appellant in this case could clearly have avoided the tax and as surely would have done so had it had any indication that the tax would be imposed. All of the other 202 utilities did substantially avoid the tax in 1964 and they were joined in 1965 by the Appellant in doing so. Virginia has never complained of this avoidance; it is accepted Virginia practice.

The court below refused either to recognize or to apply this rule. Its ruling in essence merely is that a limited retroactivity in any tax does not offend constitutional limitations.

That is not the rule established by the decisions of this Court, the decisions of lower Federal courts or by the text writers.

It is important that this Court make clear its views as to the permissible retroactive application of tax statutes. That necessity is emphasized by the unfairness to the Appellant of the tax as applied in this case. Taken unawares, it was required to pay almost twice as much as 202 other utilities paid together (Exhibit 2). Comparisons between taxpayers have limited usefulness, but they may be used to demonstrate gross inequity. Gross inequity is clearly indicated here.

Virginia did not accord to the Appellant here the equal protection of its laws; it deprived this taxpayer of substantial property without due process of law. This Court should establish a definitive rule as to retroactive taxation; it has an opportunity to do so here.

2.

A State May Not Tax Intangibles Of Its Corporation That Have Acquired Commercial Domicile Elsewhere

This Court held many years ago that a State of incorporation had the power under the Constitution to levy a property tax on the intangible personal property of a corporation created by it, wherever located. *Cream of Wheat Co.* v. *County of Grand Forks,* 253 U. S. 325 (1920). But that case did not involve intangibles that had acquired a commercial domicile in another State.[5] When the Court found that intangibles had acquired a commercial domicile

[5] No question has been raised as to the commercial domicile of the intangibles and the money (except for $1,000) of the Appellant in this case. This property clearly had a commercial domicile in Georgia. The facts determining commercial domicile given by this Court in *Wheeling Steel Corp.* v. *Fox,* 298 U.S. 193 (1936), are the same facts stipulated in this case (R. 39).

in a State other than the State of incorporation, it held that the State of commercial domicile could levy a property tax against such intangibles. *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193 (1936).

Does this mean that a State of incorporation may levy a property tax on intangibles with a commercial domicile in another State? This Court has specifically refused to hold that it may. A review of the relevant cases makes this clear. In *Curry* v. *McCanless*, 307 U. S. 357 (1939), the majority opinion of this Court stated that a State of incorporation could impose a tax on intangibles regardless of their taxation in another State. But that was a 5 to 4 decision and on this specific point Mr. Justice Reed, one of the bare majority, recorded his disagreement. No case decided by this Court has held that a State of incorporation may levy a property tax on all of the corporation's intangibles when they have acquired a commercial domicile in another State. Double taxation is not constitutionally impermissible, but a corporation that is multi-State as is the Appellant presents the problem in a more acute form.

The cases are few and easy to review. In *Newark Fire Insurance Co.* v. *State Board*, 307 U. S. 313 (1939), this Court held as a matter of fact that commercial domicile in another State had not been proven. There was no question of commercial domicile in *Central Hanover Bank & Trust Co.* v. *Kelly*, 319 U.S. 94 (1943), or in *Greenough* v. *Tax Assessors*, 331 U. S. 486 (1947), for each of them involved the domiciles of individuals and not the multi-state problems of corporate operations. The same result obtains as to *State Tax Commission* v. *Aldrich*, 316 U. S. 174 (1942); no question of commercial domicile was involved.

In sum, no case decided by this Court has ever held that a State of incorporation may levy a property tax on all intangibles of its corporation wherever located and regard-

less of a commercial domicile established outside that State. This was the decision of the court below in this case. And its decision is squarely in conflict with that of the Court of Appeals of Kentucky. In *Standard Oil Co.* v. *Kentucky*, 311 S.W. 2d 372 (1958), the Court of Appeals of Kentucky refused to permit Kentucky to levy on a Kentucky corporation a tax on its intangibles that had a situs outside Kentucky. That court made its ruling clear:

> "We have seen no case, and do not expect to see one, which holds that the State of Incorporation can impose a direct ad valorem property tax on the corporate property located outside the State as a condition for permitting a corporation to be organized under its laws." (p. 376)

Yet that is what Virginia has done in this case. And the court below considered and explicitly refused to follow the Kentucky decision. The result is not the classic conflict between the circuits, but a conflict between the highest courts of two States. That is a conflict that this Court must resolve. It is a conflict based entirely on the Constitution of the United States. It deserves serious consideration.

VII.

CONCLUSION

The unfairness that has been accorded the Appellant by Virginia is obvious. But that alone is no reason why this Court should review this case. What makes this case of importance are two principles of law. The court below refused to recognize the basic principle relating to the imposition of retroactive taxes and the basic principle relating to State power to tax intangibles. In its determination as to each of these points, it was not only in error; it failed to recognize basic constitutional limitations.

This Court should review this case to make clear the limitations on State power to tax and, as well, to relieve the Appellant from significant oppression.

Respectfully submitted,

H. Brice Graves
Ralph H. Ferrell, Jr.
John W. Riely
Richard G. Joynt
1003 Electric Building
Richmond, Virginia 23212

Jack Vickrey
Howard D. McCloud
Ross Arnold
3390 Peachtree Road, N.E.
Atlanta, Georgia 30326

Counsel for the Appellant

Hunton, Williams, Gay,
Powell & Gibson
Of Counsel

Dated February 3, 1966

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APPENDIX A

1.

Opinion of the State Corporation Commission of Virginia December 15, 1964

CATTERALL, COMMISSIONER: The applicant seeks a refund of taxes paid on money and intangibles on the ground that the taxes are so unfair as to be unconstitutional. It relies partly on the fact that it is incorporated in two states, Delaware and Virginia. The reason it is incorporated in Virginia is that § 163 of the Constitution of Virginia requires it to be a Virginia corporation in order to do business in Virginia. The reason § 163 imposes that requirement is to make a public service company subject to the jurisdiction of the State for all purposes (including taxation) as a domestic corporation. Applicant complains that the same property is exposed to taxation in three states. Delaware and Georgia have not, so far as the record shows, imposed any tax on this property, but if they did, the circumstance would be immaterial.

The taxes in question were assessed under §§ 58-588, 58-593 and 58-594 of the Code of Virginia. There is no ambiguity in those sections. Applicant seeks to suggest a possible ambiguity by saying at page 21 of its brief:

"The doing of business in Virginia is the basis for the tax classification, and accordingly the tax itself must be related to the Virginia business done. This proposition is further supported by the situation of Kingsport Power Company, a Virginia electric utility corporation operating entirely outside Virginia. This Commonwealth has never attempted to levy a tax on the intangible property of that corporation even though its legal domicile is here."

The doing of business in Virginia is not the basis for the tax classification. The tax classification is:

§ 58-588. "Every corporation * * * authorized by its certificate of incorporation to transmit * * * petroleum * * * by means of a pipeline or pipelines in this State, * * *"

The tax is imposed because the corporation has that power in its charter: nothing turns on whether it ever exercises the power. The tax classification of electric utilities is different. As to them, the tax classification (§ 58-602) is:

"* * * every corporation doing in this State the business of furnishing water or heat, light and power, whether by means of electricity or gas * * *"

Kingsport Power Company has not been assessed because the statute applicable to power companies imposes no tax on it.

The intent of the General Assembly to tax all intangibles owned by pipeline companies is clear. The only question is whether the constitution forbids all or part of the tax. The rule of decision in such cases is that a court will not hold a statute unconstitutional unless it is unconstitutional beyond a reasonable doubt. In support of that proposition, 17 M. J., Statutes, § 29 cites 59 Virginia cases, the most recent being *Perry* v. *Board of Funeral Directors,* 203 Va. 161, in which the court said (p. 165):

"It has long been established that every presumption is to be made in favor of an act of the legislature, and it is not to be declared unconstitutional except where it is clearly and plainly so. Courts uphold acts of the legislature when their constitutionality is debatable, and the burden is upon the assailing party to prove the claimed invalidity."

"If any reasonable doubt exists as to its constitutionality, the act will be upheld."

Appellant's argument does not go to the length of even

claiming that the Virginia statute is unconstitutional beyond a reasonable doubt: at most it attempts to cast doubt on the statute's constitutionality.

There was a time when the Supreme Court of the United States attempted to keep two states from taxing the same intangible property; but it gave up that attempt long ago. The turning point came in *Curry* v. *McCanless,* 307 U. S. 357 (1939).

In *Curry* v. *McCanless,* an Alabama trustee held intangibles in trust. The *cestui que* trust was domiciled in Tennessee and died. Both states sought to collect inheritance taxes. The Supreme Court of Tennessee held that Tennessee *could* and that Alabama could *not* tax the transfer of the intangibles. Its decision was based on its belief that intangibles could be taxed in only one state. Its belief was based on the fact that the United States Supreme Court had recently so held in *First National Bank* v. *Maine,* 284 U. S. 312.

On appeal, five Justices of the Supreme Court purported to distinguish *First National Bank* v. *Maine* and held that both states could tax the securities owned beneficially by a citizen of Tennessee and held in trust by an Alabama trustee. Four of the five Justices were prepared to go further than one of them. Accordingly, they expressed their views in a sweeping dictum that exactly covers the constitutional question we have to decide. Counsel for Colonial Pipeline Company assert that *Curry* v. *McCanless* does not apply to this case because the tax in that case was on the *transfer* of the securities and the tax in the present case is on the *ownership* of the securities. The sweeping dictum covered all taxes and expressly covered taxes on ownership. It begins by citing eight cases holding that the state of "business situs" can tax intangibles used in business there; and then goes on to declare that the same intangibles may also be taxed by the state of the domicile of the owner.

Omitting the citations, the dictum is:

"The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. * * * But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."

That means that Virginia can tax *all* the intangibles of Colonial Pipeline regardless of the "business situs" of those intangibles, regardless of whether they *can* be taxed in Delaware and Georgia, and regardless of whether they *are* taxed in Delaware and Georgia.

The four Justices who concurred in the sweeping dictum were obviously dissatisfied with the line of cases culminating in *First National Bank* v. *Maine:* Three years later, three of the four dissenting Justices in *Curry* v. *McCanless* were off the bench, and the court overruled the line of cases culminating in *First National Bank* v. *Maine.*

In *State Tax Commission of Utah* v. *Aldrich,* 316 U. S. 174 (1942) the court's holding is stated at page 181 as follows:

"For the reasons stated we do not think that *First Nat. Bank* v. *Maine* should survive. We overrule it. In line with our recent decisions in *Curry* v. *McCanless, Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State."

Counsel for the Pipeline Company object (p. 13 of their brief) that Mr. Justice Reed did not concur in the sweeping dictum in *Curry* v. *McCanless* that fits this case like a glove; and that *Curry* v. *McCanless* did not involve *ad valorem*

property taxation. (p. 12 of their brief.) Both objections evaporate in the light of *Greenough* v. *Tax Assessor,* 331 U. S. 486 (1946) which did involve *ad valorem* property taxation and the opinion in which was written by Mr. Justice Reed.

That case involved a statute imposing a tax on securities held in trust by any executor, administrator or trustee. There were two testamentary trustees. The active trustee, the *cestui que* trust and the securities were in New York. The inactive trustee was a resident of Rhode Island. The Rhode Island tax was on "the resident trustee's proportionate part [one half] of these trust intangibles." On the constitutional power of a state to tax intangibles at the domicile of the owner, the court said (p. 492):

"So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domicilary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicle of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles. Normally the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment."

The dissenting Justices in that case did not dissent from the foregoing statement of the law.

In *Central Hanover Bank* v. *Kelly,* 319 U. S. 94 (1943) an unanimous court agreed with what was said in *Curry* v. *McCanless* about the state of domicile. At page 96 the court said:

"It is much too late to contend that domicle alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state, keeps the paper evidences of the intangibles outside its boundaries. See *Blackstone* v. *Miller,* 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277; *Blodgett* v. *Silberman,* 277 U. S. 1, 72 L. ed. 749, 48 S. Ct. 410; *Curry* v. *McCanless,* 370 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, 123 A. L. R. 162, and cases cited. The command of the state over the owner, the obligations which domicile creates, the practical necessity of associating intangibles with the person of the owner at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax. *Curry* v. *McCanless, supra.*"

The gist of applicant's argument is summed up on page 11 of its brief as follows:

"The Supreme Court has never held that a State of incorporation may levy a direct *ad valorem* property tax on all the intangibles of its domestic corporation regardless of the existence of a commercial domicile in another State, and there is language in the Court's opinions that indicates that such a tax would be unconstitutional."

There is no such language in any of the Court's opinions delivered since 1939, and even if there were such language it would not "indicate" that the Virginia statute is unconstitutional beyond a reasonable doubt. Applicant's argument is not that the failure of the statute to apportion the

tax burden is in plain violation of the constitution. Its argument is that we should declare the statute void because of the possibility that five Justices of the Supreme Court might at this late day be persuaded to disinter the long-buried doctrines of Mr. Justice McReynolds, *Newark Fire Ins. Co.* v. *State Bd. of Tax Appeals,* 307 U. S. 313 (1939) was decided the same day as *Curry* v. *McCanless.* Two of the judges then sitting are still sitting. Justices Black and Douglas concurred with Justice Frankfurter in saying:

"Wise tax policy is one thing; constitutional prohibition quite another." * * * "When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

The argument that a Virginia court should declare void a Virginia taxing statute because twenty-five years ago there was "language in the Court's opinions that indicates that such a tax would be unconstitutional" assumes that the Commonwealth has the burden of proof, assumes that a law is void if its constitutionality is doubtful, and ignores the holding of *Perry* v. *Board of Funeral Directors,* 203 Va. 161, 165:

"Courts uphold acts of the legislature when their constitutionality is debatable, and the burden is upon the assailing party to prove the claimed invalidity."

What has been said demonstrates that Virginia has constitutional authority to tax all the intangibles and all the money of a Virginia corporation. *Commonwealth* v. *Appalachian Electric Power Company,* 193 Va. 37 (1951) did not question the power of the state to tax all the money of domestic corporations. Since 1941, however, the Commission had been prorating the tax on money. When the writer of this opinion became a member of the Commission in 1949

he was convinced that the administrative interpretation was erroneous and gave his reasons at page 38 of the 1951 Annual Report of the State Corporation Commission. The majority adhered to its administrative interpretation. The Attorney General took an appeal, and the Court of Appeals upheld the administrative interpretation, saying (p. 45):

"It is of course true, as the brief of the Attorney General points out, that 'the doctrine of administrative interpretation will not be allowed to change the plain meaning of the statute.' *Superior Steel Corp.* v. *Commonwealth,* 147 Va. 202, 206, 136 S. E. 666. But the disagreement here is as to whether the meaning is so plain and unambiguous as to require no interpretation. We are convinced from a consideration of the majority and dissenting opinions and the briefs of counsel that it is not. Consequently, we apply well-recognized rules for the interpretation and application of such statutes.

"We have frequently said that the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive. The Legislature is presumed to be cognizant of such construction and when long continued, in the absence of legislation evincing a dissent, the courts will adopt that interpretation. See *Smith* v. *Bryan,* 100 Va. 199, 204, 40 S. E. 652, 654; *Hunton* v. *Commonwealth,* 166 Va. 229, 242, 183 S. E. 873, 878; *Commonwealth* v. *Stringfellow,* 173 Va. 284, 289, 4 S. E. (2d) 357, 359; *Miller* v. *Commonwealth,* 180 Va. 36, 42, 21 S. E. (2d) 721, 723.

"Since the ruling of the Commission with respect to this matter became effective in 1941, the General Assembly has met for five regular sessions. Not only has it failed to make any change in the law, as interpreted by the Commis-

sion, but it reenacted the applicable statute into the Code of 1950."

There is one notable difference between the statute involved in the *Appalachian* case and the one involved in the present case. Pipeline companies have to pay the tax even if they never engage in business. The tax is imposed on them not because they do business but because they have the charter powers enumerated in the taxing statute. Electric utilities are not required to pay the tax unless they are doing business. In the *Appalachian* case the court said at page 42:

"The language employed designates the taxpayer as a 'corporation doing in this State the business' of an electric utility."

* * *

"We agree that the language of the statute indicates a relationship between the business done in Virginia and the money which is to be taxed."

There is no such language in the statute now under consideration; and, if what the court said about that language was essential to its decision, that decision does not apply to § 58-588. The court, however, gave such decisive weight to "the doctrine of administrative interpretation" as to make it abundantly clear that if the administrative interpretation had been the other way the case would have gone the other way.

The court's reliance on the doctrine of administrative interpretation in that case applies with equal force in this case. At page 44, the court said:

"The holding of the Commission in the cases now before us is in conformity with its previous administrative practice. According to the stipulation of facts, prior to 1941

the administrative practices in assessing and collecting the State tax on such utilities were not uniform or consistent. Some companies reported and were taxed on the full amount of the moneys held or on deposit, while others excluded the sums derived from operations in other States.

"About 1933, as the majority opinion says, 'a practice began to relate the tax on the money of utility companies to the business from which the money was derived.' But it was not until 1941 that the question came before the Commission for formal determination. At that time, after full consideration of the matter, the Commission reaffirmed the basic principle of the practice which had grown up with its staff, that money derived from and employed in business in another State was not within the intent of the statute.

"This decision was embodied by the Commission in a revised official form of tax return which has continued, until the assessments here under review, to govern the procedure for reporting by all utilities in this State."

The official form referred to by the court *did* permit apportionment of money and did *not* permit apportionment of intangibles. On the subject of apportioning the tax on intangibles the administrative practice has been uniform from the beginning. The Commission has always assessed the tax on all the intangibles owned by the utility and has never apportioned the tax on any basis whatever. The uniform practice of the Commission to levy the tax on all intangibles helps to explain the uniform practice of the utilities to invest in tax-exempt securities.

This brings us to the question of whether the tax is unconstitutional because retroactive. No question of interpretation is involved because the statute applies expressly to property owned on January 1, 1964. The Applicant asks

us to hold unconstitutional an Act of the General Assembly on the basis of vague dicta of lower courts that have never been approved by the United States Supreme Court.

The federal cases relied on by Applicant have one thing in common: they were decided against the taxpayer. *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922) did not involve a tax: it involved canal tolls extorted without lawful authority. If the case *had* involved a tax the decision would have been against the taxpayer. The court said (p. 339):

"The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen,* 206 U. S. 370, * * * which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time, the enactment would have been within its power. *Phillip Wagner* v. *Leser,* 239 U. S. 207, 216, 217, 60 L. ed. 230, 236, 36 Sup. Ct. Rep. 66; *Stockdale* v. *Atlantic Ins. Co.,* 20 Wall. 323, 22 L. ed. 348."

Since *Cohan* v. *Commissioner,* 39 F. (2d) 540 (C.A. 2, 1930) was decided against the taxpayer it is not an authority in favor of the Applicant. The dictum relied on by Applicant refers generally to the possibility of "extreme cases." Another dictum in the case refers specifically to retroactive statutes increasing the rates of existing taxes or imposing new taxes. At page 545, Judge Hand said:

"Nobody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress at least for periods of less than twelve months; Congress has done so from the outset. *Brushaber* v. *Union Pac., R. R. Co.,* 240 U. S. 1, 36 S. Ct. 236, 60 L. Ed. 493, L. R. A. 1917D,

414, Ann. Cas. 1917B, 713; *Lynch* v. *Hornby,* 247 U. S. 339, 38 S. Ct. 543, 62 L. Ed. 1149. The same rule applies to excises (*Billings* v. *U. S.* 232 U. S. 261, 34 S. Ct. 421, 58 L. Ed. 596), even when imposed for the first time."

In *Billings* v. *United States,* 232 U. S. 261 (1914), the court, disposing of the claim that a new annual use tax on the American owners of foreign-built yachts was unconstitutionally retroactive, said (p. 282):

"Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint* v. *Stone Tracy C.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, and authorities there cited. While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction, and not of reconstruction, and therefore does not authorize a judicial re-enactment by interpretaion of a statute to save it from producing a retroactive effect."

United Business Corporation v. *Commissioner,* 62 F. (2d) 754 (C. A. 2, 1933) is cited by Applicant as "another case in point." It is in point. It was decided against the taxpayer. The holding of the court was: "* * * the power is undoubted to make ordinary taxes retroactive so far." (That is, to the preceding 1st of January.) Judge Hand's dictum referred to but not quoted by counsel for applicant suggested that perhaps there ought to be a *"locus penitentiae"* for "such a tax as this." The tax was not an ordinary tax but an extraordinary 25% surcharge designed to discourage tax avoidance by forming a corporation to accumulate income.

In *Prather* v. *Commissioner,* 322 F. (2d) 931 (C. A. 9,

1963) the retroactive tax was upheld on two grounds. One of the grounds is stated in Appellant's brief. The other ground is stated by the court (p. 938):

"Further, it just can't be accepted as a reason to declare a statute unconstitutional the circumstances that they would not have transferred their business to a corporation had they known about statutory changes to come."

The foregoing statement is not mere dictum. A decision resting on two grounds is authority for both grounds. *United States* v. *Title Ins. Co.*, 265 U. S. 472, 21 C. J. S., Courts § 190b., p. 315, note 90.

The Pipeline Company complains that if it had known the law was to be changed it would have put its money in government securities. Obviously, the Prathers would not have done what they did had they known about statutory changes to come. The burden of the tax on the Prathers was greater than the burden of the tax on this pipeline company. The court described the consequences of the tax to the Prathers, saying it:

"* * * about ruins the Prathers and takes the fruits of a business they built up for over 13 years."

Their 1954 income was $9,000; their 1954 income tax was $160,000.

Wilgard Realty Co. v. *Commissioner*, 127 F. (2d) 514 (C A. 2, 1942) is another case that was decided against the taxpayer. The court's dictum quoted in Applicant's brief is followed by another dictum more nearly applicable to the case at bar. The court said (p. 517):

"Sometimes the extent of permissible retroactivity can be measured with sufficient certainty in terms of time. As for instance, the 'recent transactions' as to which a retroactive tax law might be valid under *Cooper* v. *United*

States, 280 U. S. 409, 411, 50 S. Ct. 164, 74 L. Ed. 516, were in *Welch* v. *Henry, supra*, at page 150 of 305 U. S., at page 127 of 59 S. Ct., 83 L. Ed. 87, 118 A. L. R. 1142, 'taken to include the receipt of income during the year of the legislative session preceding that of its enactment.' Taxpayers must expect that fundamental changes in tax laws may be made at any time in a taxable period to be effective for the entire period and in addition for some time previously, as the above cases show. That is to say, retroactivity in taxation which would otherwise be so arbitrary as to be unconstitutional may escape such disability if it is not too great in point of time."

The meaning of this dictum is that no matter how extreme the case may be and no matter how disappointed the taxpayer is, a tax retroactive to the preceding first day of January can never be unconstitutional.

In *Welch* v. *Henry*, 305 U. S. 134 (1938) the taxpayer invested the bulk of his fortune in tax-exempt securities. He did what the Applicant wishes it had done. His 1933 gross income of $13,000 included $12,000 in dividends paid by Wisconsin corporations which were tax-exempt under Wisconsin law. In 1935 Wisconsin passed a statute taxing the 1933 dividends. The court said (pp. 146, 147):

"The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive."

* * *

"In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the

time of the particular voluntary act which the statute later made the taxable event."

* * *

"In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

"Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. See *Phillip Wagner* v. *Baltimore*, 239 U. S. 207, 60 L. ed. 230, 36 S. Ct. 66; *Seattle* v. *Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 S. Ct. 44; compare *Citizens' Nat. Bank* v. *Kentucky*, 217 U. S. 443, 454, 54 L. ed. 832, 836, 30 S. Ct. 532; *Billings* v. *United States*, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 S. Ct. 421."

The present case is not distinguishable from *Welch* v. *Henry*, and the refund applied for cannot be allowed.

HOOKER, *Chairman*, and DILLON, *Commissioner*, concur.

2.

Order of the State Corporation Commission of Virginia of December 15, 1964

THE APPLICATION herein was heard on November 4, 1964 and continued to December 14, 1964 for the purpose of oral argument upon briefs filed by the parties in interest. The applicant was represented by John W. Riely and H. Brice Graves, its counsel, the Commonwealth by D. Gardiner Tyler, Assistant Attorney General, and the Commission by its counsel.

NOW ON THIS DAY the Commission having considered the evidence herein, the briefs and argument of coun-

sel is of the opinion for reasons set forth in an opinion of this date by Commissioner Catterall and filed herein, that the application herein should be denied.

IT IS THEREFORE ORDERED that the application of Colonial Pipeline Company for review and correction of the taxes assessed against it on money held and intangible personal property owned by it for the year beginning January 1, 1964 be denied and this proceeding be dismissed and dropped from the docket.

AN ATTESTED copy hereof and of the opinion referred to herein shall be sent to John W. Riely, Electric Building, D. Gardiner Tyler, Assistant Attorney General, and to the Director of Public Service Taxation of the Commission.

3.

Opinion of the Supreme Court of Appeals of Virginia
November 29, 1965

EGGLESTON, CHIEF JUSTICE: This is an appeal of right from an order of the State Corporation Commission denying the application of Colonial Pipeline Company for refund of taxes assessed on intangible personal property and money owned by it as of January 1, 1964. The assessment was made by the Commission on May 12 of that year and the taxes were paid under protest. Refund was sought on the grounds that the amendment to Code (Repl. Vol. 1959), 1964 Cum. Supp., § 58-588, effective on March 10, 1964, which authorized the assessment of these taxes on property owned by Colonial as of January 1 of that year, was retroactive in its application and in contravention of the Constitution of Virginia and the Constitution of the United States; that on January 1, 1964, as of which date these taxes were assessed, the commercial domicile

of Colonial and its property sought to be taxed was in the State of Georgia and not in the State of Virginia, and that the latter lacked the constitutional authority to impose a tax on its property. Moreover, Colonial contended that since the commercial domicile of its property was outside the State, Virginia may not tax a greater portion of intangible property and money than is justified by the ratio of Virginia business or investment to the total of its business or investment.

The case was heard by the Commission on an agreed stipulation of facts and oral testimony. Based on a written opinion by Commissioner Catterall and concurred in by his associates, the Commission entered an order validating the assessment and denying the refund. Hence this appeal.

Colonial is a public service corporation chartered and organized under the laws of the State of Delaware for the purpose of constructing a petroleum products pipeline to transport various grades of gasoline, kerosene, heating oils and similar products from the producing and refining area of the Gulf Coast northeastwardly to the eastern seaboard. This line crosses Virginia.

Since Colonial is a public service corporation, it must be a Virginia corporation in order to exercise the power of eminent domain or to carry on the functions of a public service corporation in this State. (Constitution of Virginia, § 163.) To comply with this constitutional requirement, Colonial formed a wholly-owned Virginia subsidiary which was merged into the parent company. The result of that merger was to convert Colonial into a Virginia corporation as well as a Delaware corporation. After the merger and prior to January 1, 1964, Colonial has exercised the power of eminent domain in Virginia and in other States.

As of January 1, 1964 Colonial maintained a statutory office in Wilmington, Delaware, and a registered office in

Richmond, Virginia. As of that date, and thereafter, it maintained its general business office at 3390 Peachtree Road, N. E., Atlanta, Georgia. The general books and accounting records were kept at that office. The president, executive vice-president, vice-president and general counsel, secretary, treasurer and other officers all resided in Atlanta. The affairs and business of Colonial were managed and directed from the Atlanta office; all bills for its pipeline services were prepared and mailed from that office, and all collections were made there.

Chapter 217 of the Acts of Assembly of 1964 amended Code, § 58-588, so as to subject to taxation in Virginia pipeline companies having the power of eminent domain in this State and "authorized * * * to transmit * * * crude petroleum and the products or by-products thereof * * * in this State."[1] The Act of amending the statute, which was an emergency act and in force from its passage, was approved by the Governor on March 10, 1964. It was specifically made applicable to the tax year beginning on January 1, 1964, and to each year thereafter.

On January 1, 1964 Colonial's pipeline in Virginia was under construction. As of that date it had money on deposit in banks located in Georgia and in New York. This money was derived from loans made to Colonial by New York banks and the funds were used for the construction of its pipelines. It also owned other intangible property, consisting of United States Treasury bills and short-term notes of certain financial institutions. These investments were made by telephone from Colonial's Atlanta office to banks or investment banking houses in New York.

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[1] Prior to the amendment the statute was applicable to "Every corporation having the power of eminent domain in this State and authorized by its certificate of incorporation to transmit *natural gas* in the public service by means of a pipe line or pipe lines in this State." (Italics supplied.)

In assessing Colonial's intangible property for taxation as of January 1, 1964, the Commission deducted the amount of the United States Treasury bills which were not taxable, and assessed a tax of $123,450.26 on the balance of its short-term investments. According to the stipulation, "The tax on money was arrived at by reducing the total amount of money on hand and on deposit at January 1, 1964, of $22,486,400.82 by amounts allocated to Georgia and New York on the basis of the ratio of investments in property, plant and equipment in those States to total investments of Colonial, leaving $19,489,267.80 taxable at the rate of 20 cents per $100, producing a tax of $38,978.54."

Certain officials of Colonial testified that had they known that legislation would be enacted by the State of Virginia at its 1964 session of the General Assembly authorizing the imposition of these taxes as of January 1, 1964, Colonial would have, before that date, converted its excess intangible personal property and money into nontaxable United States Government bonds.

The first contention of Colonial is that the provision in the Act amending Code, § 58-588, making it applicable to the tax year beginning January 1, 1964, is retroactive tax legislation which has frequently been condemned by the courts as unconstitutional and void. The argument is that since the Act amending the statute became effective on March 10, 1964, this taxpayer did not know or have reason to believe before January 1, 1964, that such a tax would be levied; that had it known or had reason to believe before this date that the tax would be levied, it had at hand means of avoiding it which presumably it would have used. Consequently, it says, the "retroactive application" of such "unanticipated taxes" for the year 1964 is "unfair, unreasonable and unjust," and such taxes are unconstitutional and void.

We do not agree with this contention. In the first place, it is debatable, to say the least, whether a statute enacted during the taxable year authorizing the assessment of a tax on property held by a taxpayer as of January first of that year should be classified as "retroactive tax legislation" which has sometimes been condemned by the courts. Under our Constitution (§ 46) the General Assembly meets in regular session once in two years on the second Wednesday in January. During such sessions it frequently revises the tax structure of the State and makes such revisions effective as of the first day of that year. In so doing, it fixes the base for the effective date of such taxes at that date.

But assuming that this provision amending § 58-588, making it applicable to the tax year beginning January 1, 1964, may properly be classified as "retroactive legislation," it does not follow that it is violative of either the State or Federal Constitutions. It is well settled that the mere retroactivity of a statute affecting taxation does not render it unconstitutional. Such a statute is valid if it is not arbitrary and does not disturb vested rights, impair contractual obligations, or violate due process. 16A C. J. S., Constitutional Law, § 419, p. 116 *ff.*; 51 Am. Jur., Taxation, § 109, p. 143; *Id.*, § 122, p. 161; *Id.*, § 661, pp. 623, 624; *Welch* v. *Henry,* 305 U. S. 134, 146, 59 S. Ct. 121, 125, 83 L. ed. 87.

In the present case no question of disturbing vested rights is involved. No one has the vested right to be free of taxation, nor does he have the constitutional right to know that a tax will be levied in such a manner that he may avoid it.

In the gift tax cases upon which Colonial relies (*Nichols* v. *Coolidge,* 274 U. S. 531, 47 S. Ct. 710, 71 L. ed. 1184, 52 A. L. R. 1081; *Blodgett* v. *Holden,* 275 U. S. 142,

48 S. Ct. 105, 72 L. ed. 206, and *Untermeyer* v. *Anderson*, 276 U. S. 440, 48 S. Ct. 353, 72 L. ed. 645), the Supreme Court held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute. This was so because the effect of the enactment was to disturb such vested rights. But, as was pointed out in *Welch* v. *Henry, supra,* "Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfuly urged in the gift cases." 305 U. S. at 147, 59 S. Ct. at 126.

It is true, as Colonial says, that the *Welch* case involved the constitutionality of a retroactive *income* tax, but we think the principles there enunciated apply with equal force to the present case involving ad valorem property taxes.

In *Department of Industrial Relations* v. *West Boylston Mfg. Co.*, 253 Ala. 67, 42 So. 2d 787, it was held that a taxable event may be one which has occurred before the law levying the tax was enacted. Thus, a statute levying excise taxes for the current year may be made applicable to transactions for the entire year. See also, *Roth Drugs* v. *Johnson*, 13 Cal. App. 2d 720, 57 p. 2d 1022.

In *Merchants Nat. Bank of Boston* v. *Merchants Nat. Bank of Boston*, 318 Mass. 563, 62 N. E. 2d 831, it was held that property subject to taxation may be taxed as of a date prior to the passage of the statute, provided such retroactive operation does not extend back for more than a reasonable period.

In the case before us the retroactive operation of the statute was within the current year and within three months of the date on which the statute became effective. Surely, such retroactive operation did not extend for more than a reasonable period, nor was it "so harsh and oppressive as to

transgress the constitutional limitation." *Welch* v. *Henry, supra,* 305 U. S. at 147, 59 S. Ct. at 126.

In its brief Colonial admits that the retroactive application of a tax is valid if "the taxpayer had on the tax day a reasonable expectation that the tax would be imposed on the transaction or condition in question." We think the record here shows that prior to January 1, 1964 Colonial had a reasonable expectation that the tax would be imposed. In 1963, in the case of *Commonwealth ex rel. White* v. *Colonial Pipeline Co.,* 1963 S. C. C. Rep. 83, one of the questions involved was whether Code, § 58-588, as then written and prior to the amendment, applied to Colonial. In an opinion handed down on October 24, 1963, the Commission held that it did not. The effect of this holding was to exempt Colonial from taxation under the statute as it then stood. Colonial should have known that at the next session of the General Assembly, which was then approaching, the statute would be so amended as to subject it to a tax. Indeed, such was the obvious purpose of the amendment.

We hold that the provision in the statute, as amended, making it applicable to the tax year beginning on January 1, 1964, is not violative of any provision of either the State or Federal Constitutions.

Colonial's next contention is that as of January 1, 1964, the date on which its property was assessed for taxes under § 58-588, as amended, its commercial domicile was in the State of Georgia; that the taxable situs of its intangible property and money was there, and that the State of Virginia is prohibited by the Constitution of the United States from levying a tax on such property.

In its brief Colonial premises its argument thus: "The Supreme Court of the United States has never held that a State of incorporation has the constitutional authority to

impose a direct property tax on all the intangible property, wherever located, of a corporation when the property in question has acquired a situs at a commercial domicile outside the State."

There are ready answers to this premise. In the first place, the power of the State of Virginia to levy taxes is not derived from the Constitution of the United States as interpreted by the Supreme Court. On the contrary, the State has the inherent and unlimited power of taxation unless restrained by its Constitution or the Constitution of the United States. 18 Mich. Jur., Taxation, § 3, pp. 125, 126, and cases there collected. Moreover, there is a presumption of the constitutionality of a statute and the burden is upon the assailing party to prove its invalidity. 16 Am. Jur. 2d, Constitutional Law, § 137, p. 336 *ff.*; *Id.*, § 172, p. 390 *ff.*, 16 C. J. S., Constitutional Law, § 99, p. 388.

We are pointed to no decision of the Supreme Court, nor have we found any, which expressly holds that the State of incorporation may not levy an ad valorem tax on the intangible property and money of a corporation which has its commercial domicile in another State.

The nearest precedent for the position of Colonial is *Standard Oil Co.* v. *Commonwealth*, 311 S. W. 2d 372, decided by the highest court of Kentucky in 1958. Standard Oil Company, a Kentucky corporation with its home office in Louisville, was engaged in the business of marketing petroleum products in Kentucky, Georgia, Alabama, Mississippi and Florida. Products were shipped directly to the States in which they were to be sold. Separate books of accounts receivable and notes were entered and listed in each State and collections were deposited in local banks. No one at the home office had the authority to draw checks on the accounts in the other States. The taxing authorities of Kentucky admitted that a part of the accounts receivable

and notes had a commercial, legal and taxable situs in States other than Kentucky. Kentucky undertook to levy a tax upon the accounts receivable and notes derived from the business operated in the other States and from the bank deposits derived from such accounts receivable and notes. The Supreme Court of Kentucky held that the State did not have the constitutional authority to impose an ad valorem tax on this intangible property which had a business situs elsewhere, because those intangibles received no benefit or protection from Kentucky.

This decision was based largely on *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 56 S. Ct. 773, 80 L. ed. 1143. This latter case held that where intangibles had acquired a commercial domicile in West Virginia they could be taxed by that State even though the owner was incorporated under the laws of Delaware. However, it did not hold that Delaware, the State of incorporation, lacked the power and authority to tax the same property.

In the present case there is no showing that Colonial's intangibles and money were produced from business carried on in Georgia. The funds are merely kept there for Colonial's convenience.

Moreover, contrary to the facts in the Kentucky case, Colonial derives a substantial benefit from the laws of the State of Virginia. It claims the power of eminent domain under the laws of this State and has exercised it.[2] The landowners of Virginia have the right to look to such intangible property for redress where their lands have been taken by Colonial. Colonial, on the other hand, needs and has the protection of the laws of Virginia in defending such actions.

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[2] See *Peck Iron & Metal Co.* v. *Colonial Pipeline Co.,* Record No. 5937, and *Ferguson* v. *Colonial Pipeline Co.,* Record No. 6089, now pending in this court.

For these and other reasons to be stated, we are not inclined to follow the decision in *Standard Oil Co.* v. *Commonwealth, supra,* as a precedent in the case now before us.

It will be observed that in the present case no question of double taxation is involved. There is no showing that the State of Georgia, as the alleged domicile of Colonial, has levied any tax on Colonial's intangible property and money on which Virginia has made its assessment. But the fact that this property may be subject to taxation in Georgia does not *per se* preclude the State of Virginia from subjecting it to taxation.

In *Curry* v. *McCanless,* 307 U. S. 357, 59 S. Ct. 900, 83 L. ed. 1339, 123 A. L. R. 162, an Alabama trustee held intangibles in trust. The beneficiary was domiciled in Tennessee and died. Both States sought to collect inheritance taxes. It was held that both could collect. In a dictum by four of the justices who concurred in the result, this was said:

> "* * * The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. * * * But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. *Cream of Wheat Co.* v. *County of Grand Forks, supra,* 253 U. S. 329, 40 S. Ct. 559, 64 L. Ed. 931; see *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124." 307 U. S. at 368, 59 S. Ct. at 906.

The principle here stated was later approved in *State Tax Commission of Utah* v. *Aldrich,* 316 U. S. 174, 62 S. Ct. 1008, 86 L. ed. 1358, where it was said that in line

with that decision and others, "we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State." 316 U. S. at 181, 62 S. Ct. at 1012. See also, *Newark Fire Ins. Co.* v. *State Board of Tax Appeals*, 307 U. S. 313, 59 S. Ct. 918, 83 L. ed. 1312.

In *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325, 328, 329, 40 S. Ct. 558, 64 L. ed. 931, it was held that a State of incorporation might tax intangibles of its corporation although the physical property and business of the corporation are entirely in another State.

On the whole, we are of opinion that there is no prohibition in the Constitution of the United States against the levy by the State of Virginia of the taxes here in question on all of the intangibles and all of the money of Colonial, although that corporation may have a commercial domicile in the State of Georgia.

The final contention of Colonial is that since its money and intangibles have a commercial domicile outside of Virginia, the base of the property tax should be limited to a ratio of the Virginia business or investment to the total value of such business or investment.

This contention is based on the premise that doing business in Virginia is the basis of the tax classification here. This is not true. The classification clearly expressed in § 58-588, as amended, is: "Every corporation * * * *authorized* by its certificate of incorporation *to transmit* * * * crude petroleum and the products or by-products thereof * * * by means of a pipeline or pipelines in this State, * * * ." (Italics supplied.) The tax is imposed because the corporation has that power in it charter. Whether it exercises that power and does business in this State is not material to the classification.

Moreover, the statutes (Code, §§ 58-588, 58-590, 58-593, 58-594), providing for the assessment, rate of tax-

ation, etc., on this class of corporations, contain no provision for the apportionment of the tax in the manner urged by Colonial.

Commonwealth v. *Appalachian Electric Power Co.*, 193 Va. 37, 68 S. E. 2d 122, cited by Colonial, involved the validity of taxes assessed pursuant to Code, §58-602, on money owned by a corporation "doing in this State the business of furnishing * * * electricity." We upheld the administrative interpretation placed upon that statute by the Commission permitting the apportionment of the tax on money. We did so because, as we there said, "the language of the statute indicates a relationship between the business done in Virginia and the money which is to be taxed. 193 Va. at 42, 68 S. E. 2d at 125. There is no such language in the statute now under consideration (§ 58-588, as amended) with respect to the tax on pipeline companies.

The order of the Commission appealed from is

Affirmed.

4.

Order of the Supreme Court of Appeals of Virginia
November 29, 1964

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby, affirmed.

Which is ordered to be certified to the said Corporation Commission.